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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 505

MICHAEL OBERMEIER,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Michael Obermeier, respectfully prays that a writ of certiorari issue to review so much of the decision of the United States Court of Appeals for the Second Circuit rendered in the above entitled action, and the judgment entered thereon in the Office of the Clerk of said Court, as affirms the conviction of petitioner upon the third count of the indictment against him in said action.

A

Statement of the Matter Involved *

On September 28, 1948 petitioner was indicted on three counts, each of which charged him with the crime of making

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* Figures in parentheses, unless otherwise noted, refer to pages of the record.

a false statement under oath in a matter relating to naturalization and citizenship (2, 7-8). The third count reads as follows (8):

> "That on or about the 6th day of June, 1946, within the Eastern District of New York, the defendant, Michael Obermeier, did knowingly make a false statement under oath in a matter relating to naturalization and citizenship, to wit: While being orally examined and questioned under oath by a United States Naturalization Examiner, did falsely state to said examiner that he, the defendant, had not at any time been a member of the Communist Party (Title 8, United States Code, Section 746(a)(1))."

The first and second counts were identical with the third, except that the dates of the offenses alleged in those counts are May 26, 1945 and June 2, 1945, respectively (7-8).

Petitioner waived trial by jury (9-10) and was tried in the United States District Court for the Eastern District of New York before Hon. Robert A. Inch without a jury. Upon the trial it was stipulated that petitioner had been a member of the Communist Party from 1930 to January 1, 1939 (190-191, 12). In respect to the first two counts, petitioner contended that they were barred by the statute of limitations. In respect to the third count, petitioner contended that there was no legal authority for the administration of the oath alleged in that count and that the Government had failed to prove petitioner's guilt beyond a reasonable doubt.

Judge Inch found petitioner guilty on all three counts (180, 230-238) and sentenced him to two years' imprisonment on each count and a fine of $1,000 on the first count, the prison sentences to run concurrently (4, 188).

The United States Court of Appeals for the Second Circuit reversed petitioner's conviction upon Counts One and Two on the ground that prosecution upon those counts was barred by the statute of limitations (257-270, 271). It affirmed his conviction upon Count Three (248-256, 271).

On January 2, 1951, the Court of Appeals granted petitioner a stay of the mandate and a continuance of bail pending application to this Court for a writ of certiorari. Two of the Judges who joined in granting the stay and continuance of bail were Chief Judge Learned Hand and Associate Judge Swan, both of whom heard the original appeal.

B

The Jurisdiction of This Court

Petitioner seeks review by certiorari pursuant to Title 28, United States Code, Section 1254. The date of the decision and judgment sought to be reviewed is December 20, 1950.

C

The Statute Involved

The statute involved is the Nationality Act of 1940, as amended, Title 8, United States Code, Sections 501 et seq. The relevant sections of the statute are 8 U. S. C. Sections 724, 727, 731, 732 and 733. The pertinent portions of those sections are set forth in Appendix A to the brief in support of this petition.

D

Petitioner's Background

Petitioner, fifty-eight years of age, was born in Germany. He entered the United States as an alien in 1914 and was admitted lawfully for permanent residence in 1923. Since then, he has resided continuously in the United States, except for two temporary visits abroad (190-191).

He is married and is the father of two American-born children (113-114). His son served honorably in the United States Marines during the last war (114, 131); his daughter is a Research Fellow in the Biology Department of Cali-

fornia Institute of Technology and is married to an American-born citizen who also served in the armed forces of the United States (131).

For the greater part of his life the petitioner engaged in trade union activities (203-207) and for the past eight years was president of the Hotel and Club Employees Union, affiliated with the American Federation of Labor (118, 190). He was also on the board of directors of the New York Hotel Trades Council which represents a number of unions in dealing with employers in the hotel industry of the City of New York (108-110).

The petitioner has never before been convicted or even arrested for a crime (214). His excellent reputation in the hotel industry as well as in labor circles was attested to by many responsible citizens (104-134). The testimony of one of them, Robert K. Christenberry, is worthy of particular attention. Mr. Christenberry is president of the Hotel Astor, a director of the Ritz-Carlton Hotel, and a member of the Board of Governors of the Hotel Association of New York City (104). He testified:

> "Q. Can you tell us what his reputation is generally? A. He enjoys a reputation for veracity. As a matter of fact I have never heard of a man whose word I would accept more readily. I have never known a man in labor circles whose word I would value more highly." (108)

E

The Facts

The perjury alleged in Count Three of the indictment is claimed to have been committed during a preliminary examination in naturalization proceedings at a time when this petitioner was an applicant for naturalization (68-69). He had filed an application known as Form N-400, entitled "Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization" (75, 82, 227). He had not at the time of said examination filed the petition

for naturalization provided for by 8 U. S. C. Section 732 (69).

The preliminary examination in question was admittedly (68-69, 238, 249-250) not a preliminary hearing as specifically provided for by 8 U. S. C. Section 733, which is to be held *after* the filing of a petition. It was a prepetition examination held pursuant to a departmental regulation (8 C. F. R. Sec. 370.8) (68-69, 238, 249-250).

The examination in question was oral and was not conducted in the presence of a stenographer; no official record was made of the administration of an oath, nor were the questions and answers reduced to writing (78-80).

The sole evidence adduced by the Government to prove the administration of the oath and the making of the alleged false statement was the testimony of the preliminary examiner, one Louis M. Dillon. On direct examination Mr. Dillon testified that on June 6, 1946, petitioner was "put under oath" and that in the course of the examination petitioner was asked whether he was ever a member of the Communist Party, to which question he gave the answer "No" (64-65). On cross-examination Mr. Dillon admitted that his testimony that petitioner had made the false statement in question was his "interpretation" or "conclusion" as to the meaning of petitioner's "lengthy explanations" (72-74). He also admitted that he had no distinct recollection as to whether he administered an oath but that he believed he did so because that was his practice in every case (79-80).

F

Questions Presented

The questions presented in this case and of which review is sought by this petition are:

1. Was there statutory authority for the administration of the oath alleged in Count Three of the indictment upon which petitioner's conviction is based?

2. Is the evidence sufficient in law to establish that petitioner made a false statement or that, if he did, he was under oath?

C

Reason Relied on for the Allowance of the Writ

This case presents an important and novel question of the construction of the Nationality Act of 1940. That question is: Since Congress has specifically prescribed by statute *one* examination in which an alien seeking citizenship is required to testify under oath with respect to his qualifications, does the Commissioner of Immigration and Naturalization have power to compel the alien to submit to an *additional* examination under oath with respect to the same subject matter?

It is, of course, fundamental that a person cannot be convicted of perjury unless the oath under which he testified falsely is authorized by law (*United States* v. *Curtis*, 107 U. S. 671; *United States* v. *George*, 228 U. S. 14; *Williamson* v. *United States*, 207 U. S. 425).

The Nationality Act contains express provisions requiring a person seeking citizenship to file a declaration of intention under oath (8 U. S. C. Sec. 731) and a petition under oath (8 U. S. C. Sec. 732), and to submit to an examination under oath in a preliminary hearing *after* the petition has been filed (8 U. S. C. Sec. 733). But the Act contains no provision for the preliminary examination under oath here involved, which was held *prior* to the filing of a petition.

The pre-petition examination on which the third count is founded was held pursuant to an administrative regulation (8 C. F. R. Sec. 370.8). Our contention is that there is no statutory basis for this regulation, for the following reasons:

1. The express statutory provisions for the administration of oaths in connection with the declaration of intention (8 U. S. C. Sec. 731), the petition (8 U. S. C. Sec. 732)

and the post-petition hearing (8 U. S. C. Sec. 733) show a legislative intention that these are to be the only oaths which a person seeking citizenship must make.

2. The special statutory provision for pre-petition examinations for members of the Armed Forces seeking citizenship (8 U. S. C. Sec. 724) shows a legislative intention not to authorize pre-petition examinations in the case of aliens who are not members of this special class.

3. The departmental regulation here involved authorizes a pre-petition examination under oath with respect to qualifications for citizenship which duplicates the post-petition hearing under oath expressly required by Congress in 8 U. S. C. Section 733. The regulation adds an obligation not provided for by Congress and is plainly inconsistent with the statute. Hence, the regulation cannot be sustained under the Commissioner's rule-making power. (*Williamson* v. *United States*, 207 U. S. 425; *United States* v. *George*, 228 U. S. 14. See: *United States* v. *Smull*, 236 U. S. 405; *United States* v. *Morehead*, 243 U. S. 607.)

The question whether an alien seeking citizenship may, by departmental regulation, be required to submit to a pre-petition examination under oath in addition to the post-petition examination under oath expressly provided for in 8 U. S. C. Section 733 is one which has never been passed upon by this Court.

A final determination of the question is needed because the regulation here involved affects the administration of the naturalization laws in all cases of persons seeking citizenship, and particularly because the regulation makes them liable to criminal prosecution for perjury. Both the power of the Commissioner and the rights of those entitled to apply for citizenship should not be left in doubt.

The Court of Appeals recognized the seriousness of the question, to which it devoted more than eight pages of its opinion (248-256). The opinion further suggests that the Court was not completely free from doubt. It points

to "the implications which might be drawn from" the history of the legislation favorable to petitioner (254), but goes on to discuss other facts leading the Court to a contrary conclusion, even though those facts were admittedly "not necessarily compelling" (256). That an important and substantial question has survived the judgment of the Court of Appeals is further evident from the fact that the Court stayed issuance of the mandate and continued petitioner on bail pending this application.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record upon which its said decision and judgment were made, and that said decision and judgment of the Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your petitioner will ever pray, etc.

Dated: January 18, 1951.

SIDNEY E. COHN,
PAUL O'DWYER,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. ....

MICHAEL OBERMEIER,

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against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion below has not yet been reported.

II

JURISDICTION

Petitioner seeks review by certiorari pursuant to Title 28, United States Code, Section 1254. The date of the decision and judgment sought to be reviewed is December 20, 1950.

III

STATEMENT OF THE CASE

A summary statement of the case has been given in the foregoing petition for the writ of certiorari, and for brevity the statement is not repeated here.

IV

SPECIFICATIONS OF ERROR

The Court of Appeals erred in holding—

(a) That there was statutory authority for the administration of the oath alleged in Count Three of the indictment upon which petitioner's conviction was based.

(b) That the evidence was sufficient in law to establish that petitioner made the false statement alleged in the indictment.

(c) That the evidence was sufficient in law to establish that an oath was administered to petitioner.

V

ARGUMENT

A. Petitioner's conviction cannot stand unless there was statutory authority for the oath alleged in Count Three of the indictment.

This proposition, of course, was not disputed by the Government or by the Court of Appeals. Indeed, that Court, in its opinion per Judge Frank, declared (248-249):

> "Defendant further contends, however, that in any case, he committed no crime, because the oath was administered to him during a proceeding in which there was no statutory authority to administer an oath. If so, Obermeier did not commit perjury by then swearing falsely. For the Supreme Court has held that false

statements under oath 'before one who has no legal authority to administer oaths of a public nature, or before one who * * * [is] authorized to administer some kinds of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to prosecution for the statutory offense of willfully false swearing * * *. The oath must be permitted or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates.'" (Citing *United States* v. *Curtis*, 107 U. S. 671, 672-673; *United States* v. *George*, 228 U. S. 14, 21; *Williamson* v. *United States*, 207 U. S. 425, 458-460; *Dwyer* v. *United States*, 170 Fed. 160, 166.)

B. The oath in question was administered in a preliminary examination held prior to the filing of a petition, not in a post-petition hearing authorized by 8 U. S. C. Section 733.

This fact is also undisputed, as the Court below found when it stated (249-250):

"Here, the government, in its brief, distinguishes between (1) a 'preliminary examination' held 'before filing the petition for naturalization' and (2) a 'preliminary hearing' held after the petition has been filed. Had the examination on June 6, 1946 been made in connection with a petition then pending, an oath would have been explicitly authorized by the Nationality Act, and the regulations made thereunder. But the government concedes (and Dillon, the examiner, so testified) that, on June 6, 1946, when Obermeier made this statement, no petition for his naturalization was pending—since his petition, previously filed, had then been dismissed—and that the hearing was a pre-petition hearing under 8 C. F. R. 370.8.

"The question presented by this Count, then, is whether the examiner had legal authority to administer an oath to Obermeier in such a preliminary examination."

C. The Nationality Act of 1940 shows on its face that Congress did not authorize a pre-petition examination under oath of persons seeking citizenship.

The provisions of the Nationality Act prescribing the steps which a person seeking citizenship must take to establish his qualifications for citizenship are clear and explicit. Section 731 of Title 8 of the Code expressly requires an alien seeking naturalization to file a declaration of intention under oath in which he must swear, among other things, that he is not a member of a subversive organization. Section 732 expressly requires the alien to file a sworn petition containing, among other things, the same statement. Section 733 expressly requires the alien, after filing his petition, to submit to an examination under oath in a preliminary hearing before a designated examiner with power to report to the Court and to be examined "concerning any matter touching or in any way affecting * * * (his) admissibility * * * for naturalization".

The Act contains no provision for a pre-petition examination under oath of applicants for citizenship with respect to their qualifications. The omission to enact such a provision—taken in conjunction with the clear and express provisions requiring declarations of intention under oath, petitions under oath and post-petition hearings under oath—manifests a Congressional intention that applicants for citizenship should not be required to submit to a pre-petition examination under oath.

This conclusion is fortified by the fact that when Congress intended to authorize a pre-petition examination, it did so in express terms and limited it to the special case of members and former members of the Armed Forces (8 U. S. C. Secs. 724, 724A). For this there was a particular reason. In the case of the Armed Forces, Congress in 1918[1] had eliminated the requirements of a declaration of

[1] Act of May 9, 1918, ch. 69, 40 Stat. 542.

intention under oath, a certificate of arrival and residence within the jurisdiction of the Court (8 U. S. C. Sec. 724). Because these ordinary requirements of the naturalization process were dispensed with, Congress authorized a pre-petition examination as a special "safeguard".[2] Accordingly, Congress expressly provided in such cases that "before filing the petition for naturalization", the alien and his witnesses must "have appeared before and been examined by a representative of the service" (8 U. S. C. Sec. 724).

These are the only statutory provisions for a pre-petition examination. The omission of similar provisions for aliens not connected with the Armed Forces compels the conclusion that Congress did not intend to authorize pre-petition examinations in such cases.

D. The legislative history of Section 733 supports the conclusion that the only administrative examination under oath authorized by law is to be held *after* the filing of the petition.

Section 733 was first enacted as the Act of June 8, 1926, c. 502, 44 Stat. 709, and has remained substantially unchanged since its original enactment.[3]

The practice in respect to administrative examinations prior to the 1926 Act is set forth in the Annual Report of the Commissioner of Naturalization for the Fiscal Year Ended June 30, 1925. In that report the Commissioner described the procedure, after the alien has filed his application blank for a certificate of arrival, as follows:

> "The applicant is then notified to appear with two witnesses and submit to the administrative examina-

[2] Senate Report No. 388, 65th Cong., 2nd Sess., to accompany H. R. 3132, which became the Act of May 9, 1918.

[3] The change in the method of designating the examiners who are to hold the post-petition hearings under that section is not material here.

> tion preliminary to the filing of his petition. In some instances the petition is filed before this examination is made." [4]

Although the Regulations did not provide that this examination was to be under oath,[5] the examiners made reports to naturalization courts on the basis of this examination which the courts customarily followed.[6]

To relieve the courts of the burden of conducting examinations of aliens and their witnesses in court,[7] the Commissioner in his 1925 report recommended, as the Court below stated, "legislation expressly authorizing an oath in an administrative, pre-petition examination" (253).

Congress, however, did not adopt this recommendation. Instead, Congress enacted the Act of June 8, 1926, which specifically provided for an administrative examination under oath to be held *after* the filing of the petition. It did this despite the fact that the Commissioner's report showed that the usual practice was to hold the examination before the petition was filed and despite the fact that in the Act of May 9, 1918, Congress had, as we have seen, already authorized a pre-petition examination in the special case of members of the Armed Forces.

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[4] Annual Report of the Commissioner of Naturalization, Fiscal Year Ended June 30, 1925, p. 1.

[5] Naturalization Laws and Regulations, June 15, 1924, Rule 3, subd. B, par. 2.

[6] "For years the attitude of the courts to recognize and accept the report of the naturalization examiner at the hearing of petitions for naturalization has been growing * * *. For years the records of each case have been carefully made up by the examiner at the time of the administrative examination of the applicant and his two witnesses * * *. Findings are made by the examiner in each case. The courts have no specific statute authorizing them to accept these as findings in the absence of statutory authority." Annual Report of the Commissioner of Naturalization, Fiscal Year Ended June 30, 1925, p. 18.

[7] See: H. Rept. 1320, 69th Cong., 1st Sess., to accompany S. 4251.

The Court of Appeals found this legislative history to be as we have stated it. The Court said (253-254):

> "But in 1926, Congress, despite a recommendation from the Commissioner for legislation expressly authorizing an oath in an administrative, pre-petition examination, amended the Act of 1906 to provide for 'preliminary hearings upon petitions for naturalization'—i.e., after the petition has been filed. This was done after Congress had expressly provided in 1918, for pre-petition hearings to expedite the naturalization of a special class of aliens—those who were members or prospective members of the United States armed forces in World War I (a provision which was substantially re-enacted for aliens similarly situated in World War II.) And in the Nationality Act of 1940, re-codifying the naturalization laws, 8 U.S.C. § 733 which provides for post-petition hearings in the usual cases, was retained with minor changes not here relevant."

This legislative history points unerringly to the conclusion that Congress refused to authorize a pre-petition examination under oath.

E. The regulation authorizing a pre-petition examination under oath is inconsistent with the statute.

Both the pre-petition examination under oath and the post-petition hearing under oath involve the examination of the same person, namely, the alien seeking citizenship, in respect to the same subject-matter, namely, his qualifications for citizenship.[8]

Congress has provided for *one* such examination—the post-petition hearing under 8 U. S. C. Section 733. The

[8] 8 C.F.R. Section 370.8, which purports to authorize the pre-petition examination here involved, provides that the examination shall be concerned with the alien's "qualifications to become a naturalized citizen". Section 733 provides that the preliminary hearing after the petition has been filed shall be "concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization".

decisions of this Court are clear that the rule-making power of the Commissioner does not authorize him to require an applicant for citizenship to make two oaths in respect to the very same subject-matter as to which Congress has authorized but one.[9]. Congress provided "the exact measure of the obligation" [10] to be met by those seeking citizenship, namely, to testify under oath in a post-petition hearing before a "designated examiner" as required by Section 733 of Title 8. The regulation imposing the additional obligation to testify under oath with respect to the same matters in a pre-petition hearing before a "preliminary examiner" changes the requirement of Section 733. It is inconsistent with it, and is not justified by the provisions of Section 727(b) granting authority to promulgate regulations "*necessary* to carry into effect the provisions of this sub-chapter".[11]

F. The arguments advanced by the Court of Appeals for its conclusion that the oath here in question had statutory authority are unsound.

The Court below fell into fundamental error in its approach to the problem before it.

It began its analysis of the question by postulating the premise that "a regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity" (250). This premise is, to be sure, applicable to civil cases and other situations where the regulation is not relied upon as the basis for a conviction of crime. But where the regulation is sought to be made the foundation of criminal liability, there can be no such presumption or burden. For any such presumption and burden would be in direct con-

[9] *United States* v. *George*, 228 U. S. 14; *Williamson* v. *United States*, 207 U. S. 425. See *United States* v. *Smull*, 236 U. S. 405; *United States* v. *Morehead*, 243 U. S. 607.

[10] *United States* v. *George*, supra, at p. 19.

[11] See the cases cited in Footnote 9, supra.

flict with the basic principles that "where the charge is of crime, it must have clear legislative basis"[12] and that "statutes creating crimes are to be strictly construed in favor of the accused".[13] And it should be observed that none of the cases cited by the Court of Appeals in support of its premise presented a situation where criminal liability was predicated upon the regulation in question.[14]

Apart from this presumption, the Court of Appeals further argues:

1. That the general language of 8 U. S. C. Section 727(b) authorizes the Commissioner to require pre-petition hearings under oath (254-255).

2. That since 1929 it has been the practice to hold pre-petition hearings under oath and that Congress, with knowledge of that practice, never enacted any legislation to change it (255-256).

Neither of these arguments is valid.

8 U. S. C. Section 727(b) reads as follows:

> "The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this subchapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States."

[12] *United States* v. *George*, 228 U. S. 14, 22. See also *Viereck* v. *United States*, 318 U. S. 236; *United States* v. *Eaton*, 144 U. S. 677.

[13] *United States* v. *Resnick*, 299 U. S. 207, 209.

[14] See *Boske* v. *Comingore*, 177 U. S. 459; *United States* v. *Watkins*, 173 F. (2d) 599; *Carter* v. *Forrestal*, 175 F. (2d) 364; *Jacob Siegel* v. *F.T.C.*, 327 U. S. 608.

The section, on its face, does two things:

1. It grants the Commissioner power to make rules and regulations, with the limitation that such rules and regulations must be "*necessary* to carry into effect the provisions of this subchapter".

2. It authorizes him "to prescribe the scope and nature of the examination of petitioners for naturalization" with two limitations. The first of these is that "such examination shall be limited to inquiry concerning the applicant's * * * qualifications to become a naturalized citizen as required by law". The second is that "such examination * * * shall be uniform throughout the United States".

We have already shown in Point E of this brief[15] that the power of the Commissioner to make rules and regulations does not authorize him to add to the obligation imposed by Congress by requiring a pre-petition examination under oath *in addition to* the post-petition examination under oath for which Congress has expressly provided in Section 733.

Nor, we submit, does the provision authorizing the Commissioner to "prescribe the scope and nature of the examination of petitioners" empower him to require applicants for citizenship to submit to two examinations in respect to the very subject-matter as to which Congress has authorized but one. Rather, it is designed to empower him to "*prescribe the scope and nature*" of the one examination for which Congress made express provision in Section 733. This is shown by the following:

1. The provision does not read "The Commissioner * * * is authorized to require applicants to submit to a pre-petition examination". Instead it reads: "The Commissioner * * * is authorized to *prescribe the scope and nature* of *the* examination of petitioners * * * ".

[15] Supra, pages 15-16.

2. The use of the definite article *"the* examination" shows that the provision refers to a particular examination provided for elsewhere.

3. The purpose of the examination referred to, namely, "making appropriate recommendations to the naturalization courts", is the very purpose of the post-petition examination expressly provided for by 8 U. S. C. Section 733. And the record shows that the pre-petition examination here involved was not for that purpose (68-69).

4. In prescribing the "scope and nature" of "such examination", the Commissioner must limit the same "to inquiry concerning the applicant's * * * qualifications to become a naturalized citizen as required by law"—which is the very subject-matter of the post-petition examination required by Section 733.

5. Section 727 as a whole deals with matters of administration and procedural detail.[16] The substantive steps in the naturalization process (sworn declaration of intention, sworn petition and post-petition hearing under oath) were specifically provided for by Congress in separate later sections of the Act (8 U. S. C. Secs. 731, 732, 733). It cannot, therefore, be supposed that Congress intended by the procedural provisions of Section 727(b) to authorize so important an additional substantive step in the naturalization process as a pre-petition hearing under oath.

6. The legislative history of Section 727(b) shows that its purpose was simply to assure uniformity throughout the United States of the post-petition examination provided for by Section 733. Section 727(b) was first enacted as part of the Nationality Act of 1940.[17] That Act was drafted

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[16] For example, as the Court below specifically found, subdivision (e) of Section 727 does not authorize the holding of any examination under oath but "merely states what kind of persons may be authorized to administer oaths in naturalization matters" (254).

[17] Act of October 14, 1940, c. 876, Title I, subchap. III, Section 327(b), 54 Stat. 1150.

as the result of a study by revisers, who embodied their conclusions and recommendations in a lengthy report.[18] The revisers' comment on Section 727(b)[19] clearly shows the following:

(a) The purpose of giving the Commissioner the power to "prescribe the scope and nature of *the* examination" was to insure that "such examination * * * shall be uniform throughout the United States".

(b) Only *one* examination was referred to.

(c) This examination was the post-petition hearing required by Section 733, which was to be held before a designated examiner empowered to make recommendations to the naturalization court. Thus, the revisers stated:[20]

> "While the statutory authority which is now given naturalization examiners to conduct preliminary hearings, take testimony, and make recommendations to the court for the admission or denial of petitions filed in the United States District Courts, is a move in the direction of a more uniform naturalization law, a test which would be the same in every *court* through the United States would give a tremendous impetus in approaching the required uniformity of procedure" (italics supplied).

The second argument upon which the Court of Appeals rested its decision that the oath here involved has statutory authority is that "the regulations since 1929 have authorized pre-petition examinations under oath. The practice of holding pre-petition examinations was continually reported to Congress by the Commissioner, while that body was repeatedly amending the Nationality Act, including Section 733, without any change relating to this practice" (255-256).

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[18] Codification of the Nationality Laws of the United States, House Committee Print, 76th Cong., 1st Sess. (1939).

[19] Section 326(b) in the revisers' draft.

[20] Codification of the Nationality Laws of the United States, House Committee Print, 76th Cong., 1st Sess. (1939) at p. 38.

This argument is, we respectfully submit, without merit for the following reasons:

1. It is perfectly clear from the face of the Nationality Act and its legislative history, as we have shown above, that Congress did not intend to authorize the holding of pre-petition examinations under oath. Administrative practice which conflicts with this clear intent can be given no weight in determining the proper construction of the Act. "The limits of the power to issue regulations are well settled. * * * They may not extend a statute or modify its provisions." [21] Even where, after a long continued and consistent course of administrative practice, Congress has re-enacted a statute without change, presumably with that practice in mind, the practice will be disregarded in interpreting the statute when it conflicts with the intent of Congress as shown by the statutory provisions themselves.[22]

2. The Court of Appeals has cited no authority, and we have been unable to find any, to show that the Commissioner ever reported to Congress the practice of holding pre-petition examinations *under oath.*

G. The evidence does not establish as a matter of law that petitioner made the false statement alleged in the indictment or that, if he made it, he did so under oath.

As we have shown in the statement of facts in our petition (supra, p. 5), no stenographer was present at the time that petitioner was questioned by Mr. Dillon, nor were the questions and answers taken down in writing (78-80). On cross-examination, Mr. Dillon frankly admitted that his testimony that petitioner had stated that he had never been a member of the Communist Party was

[21] *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610.

[22] See *Koshland* v. *Helvering*, 298 U. S. 441, 445-447. Compare *McGrath* v. *Kristensen*, 95 L. Ed. (Adv. Op.) 165 with *Benzian* v. *Godwin*, 168 F. (2d) 952.

his "interpretation" or "conclusion" as to the meaning of petitioner's "lengthy explanations". We quote from the record (72-74):

> "Q. You found him willing to not only answer but to expand on his views, isn't that so? A. Yes, that is true.
>
> Q. And he did, when you were questioning him about his affiliations and about what organizations he belonged to, he did expand on his views, it was not merely a terse yes or no, was it? A. That is right.
>
> Q. He expanded on his views? A. Yes.
>
> Q. And you abbreviated the expansion to what you understood to be his answer? A. That is right.
>
> Q. *So what you have here given in your report is your interpretation actually of what his answer meant?* A. *That is true.*
>
> * * * * * *
>
> Q. And as a result of what he told you you came to the *conclusion* that what he meant was that he was not a member of the Communist Party, is that right? A. *That was my conclusion, yes.*
>
> Q. That was your conclusion from these lengthy explanations, is that right? A. Yes.
>
> * * * * * *
>
> Q. When you began to talk about his affiliations to him he began to give lengthy explanations to you as to his problems and the problems of the people in the hotel and restaurant industry during the period of time that he was in America; is that so? A. That is right.
>
> Q. And he began to tell you about his affiliations one with the other and the freedom of speech and things of that kind? A. That is true.
>
> Q. *And as a result of his explanations you came to the conclusion that his answer meant that he was not a member of the Communist Party? A. That was my* conclusion" (italics supplied).

It is true that on direct examination Dillon worded his testimony to give the impression that he was reporting petitioner's answer. The principle, however, that Dillon's testimony must be taken as qualified on cross-examination is elementary and needs no citation of authority.

Dillon's interpretations and conclusions are not proof of what petitioner actually said. "If a witness cannot give the words of the parties, he may, undoubtedly, be permitted to state the substance of what was said. He ought not, however, be allowed to substitute his inference from what was said."[23] As stated in *O'Neil* v. *United States*, 8 Cir., 19 F. (2d) 322, 325:

> "It is a well-settled principle of the law of evidence that a witness who has heard a statement or conversation should not be permitted to state his conclusions as to what was stated or admitted. * * * The summary prepared by Manning and introduced in evidence in the instant case was neither a verbatim transcript of what O'Neil said, nor the substance and effect of what he said. It was not O'Neil's statement, but Manning's statement of the conclusions and deductions arrived at by him from the conversation between O'Neil and the narcotic officers. It follows that its admission in evidence was erroneous."

Whatever Dillon's interpretations and conclusions may be worth, they surely may not be used as the sole basis for finding guilt beyond a reasonable doubt of the charge that petitioner made a specific false statement.

Finally Mr. Dillon admitted that he made "no written record" of administering an oath and that he did not have any "distinct recollection" of doing so (79-80). He said:

> "Q. Outside of your practice to do it in every case you have no distinct recollection of having called Obermeier to raise his right hand and swear to tell the truth on this day, is that right? A. That is true.
> Q. Is that true, Mr. Dillon? A. That is true" (80).

It is scarcely necessary to point out the danger of predicating a conviction for perjury upon an oral statement allegedly under oath where no written record was made of the administration of the oath or of the alleged perjurious statement. In this connection we call the Court's attention to Regulation 370.9, which follows immediately after the

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[23] *Hewitt* v. *Clark*, 91 Ill. 605, 608.

regulation purporting to authorize the preliminary examination here involved, and which provides:

> *"Material statements of applicants and witnesses to be in writing, under oath.* Material statements of applicants for naturalization * * * and their witnesses, shall, where deemed necessary by the naturalization officer, be taken down in writing and under oath and signed by the applicant or witness."

Yet, in the case at bar, the petitioner has been sentenced to two years' imprisonment on the third count for an alleged perjury where no written record of the administration of an oath, or of the question asked, or of petitioner's answer to it was made—and this despite the fact that the very part of the regulations under which the preliminary examination of the petitioner was conducted provides for a written record where deemed necessary.

Dated: New York, January 18, 1951.

SIDNEY E. COHN,
PAUL O'DWYER,
Of Counsel for Petitioner

APPENDIX "A" TO BRIEF IN SUPPORT OF PETITION

The relevant sections of the Nationality Act of 1940, Title 8, United States Code are as follows:

"§ 724. Persons serving in armed forces of United States.

"(a) A person, including a native-born Filipino, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such servce.

"(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this subchapter except that—

"(1) No declaration of intention shall be required;

"(2) No certificate of arrival shall be required;

"(3) No residence within the jurisdiction of the court shall be required;

"(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service. * * *

"§ 727. Administration of naturalization laws; rules and regulations; instruction in citizenship; forms;

oaths; depositions; documents in evidence; photographic studio.

"(a) The Commissioner, or, in his absence, a Deputy Commissioner, shall have charge of the administration of the naturalization laws, under the immediate direction of the Attorney General, to whom the Commissioner shall report directly upon all naturalization matters annually and as otherwise required.

"(b) The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this subchapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States. * * *

"(e) Members of the Service may be designated by the Commissioner or a Deputy Commissioner to administer oaths and to take depositions without charge in matters relating to the administration of the naturalization and citizenship laws. In cases where there is a likelihood of unusual delay or of hardship, the Commissioner or a Deputy Commissioner may, in his discretion, authorize such depositions to be taken before a postmaster without charge, or before a notary public or other person authorized to administer oaths for general purposes. * * * "

"§ 731. Declaration of intention

"An applicant for naturalization shall make, under oath before, and only in the office of, the clerk of court or such clerk's authorized deputy, regardless of the place of residence in the United States of the applicant, not less than two nor more than seven years at least prior to the applicant's petition for naturalization, and after the applicant has reached the age of eighteen

years, a signed declaration of intention to become a citizen of the United States, which declaration shall be set forth in writing, in triplicate, and shall contain substantially the following averments by such applicant: * * *

"(14) I am not an anarchist, nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. * * *"

"§ 732. Petition for naturalization

"(a) An applicant for naturalization shall, not less than two nor more than ten years after such declaration of intention has been made, make and file in the office of the clerk of a naturalization court, in duplicate, a sworn petition in writing, signed by the applicant in the applicant's own handwriting, if physically able to write, and duly verified by witnesses, which petition shall contain substantially the following averments by such applicant. * * *

"(16) I am not an anarchist, nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government.

"(17) I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. * * *"

"§ 733. Hearing of petitions; preliminary hearings

"(a) The Commissioner or a Deputy Commissioner shall designate members of the Service to conduct preliminary hearings upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such court. For such purposes any such designated examiner is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpoena witnesses, and to administer oaths, including the oath of the petitioner to the petition for naturalization and the oath of petitioner's witnesses. * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 505

MICHAEL OBERMEIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 245–270) is not yet reported. The opinion of the District Court (R. 230–238) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1950 (R. 271). The petition for a writ of certiorari was filed on January 19, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the regulation prescribed by the Commissioner of Immigration and Naturalization, providing for a preliminary, pre-petition examination under oath of an applicant for naturalization, is authorized by the Nationality Act of 1940.

2. Whether the evidence is sufficient to support petitioner's conviction.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the Appendix, *infra,* pp. 22–30.

STATEMENT

On September 28, 1948 (R. 2), petitioner, an alien, was indicted (R. 7–8) on three counts charging that on May 26, 1945, June 2, 1945, and June 6, 1946, respectively, he knowingly and falsely stated under oath "in a matter relating to naturalization and citizenship" that he had not at any time been a member of the Communist Party, in violation of Section 346 (a) (1) of the Nationality Act of 1940 (Appendix, *infra,* p. 28). He waived a jury trial (R. 230) and was found guilty by the court on all three counts and sentenced to two years' imprisonment on each, to run concurrently, and fined $1,000 on the first count (R. 188). On appeal to the Court of Appeals for Second Circuit, the judgment was affirmed as to the third count (R. 248–256) but

reversed as to counts 1 and 2 on the ground that prosecution of the offenses charged therein was barred by limitations (R. 257–271).[1]

The facts pertinent to the issues presented by the instant petition may be summarized as follows:

On April 19, 1946, petitioner filed with the Immigration and Naturalization Service Form N–400, entitled "Application for Certificate of Arrival and Preliminary Form for Petition for Naturalization"[2] (R. 82, 227, 231, 237). In conjunction with this application, petitioner was questioned under oath on June 6, 1946, in a preliminary examination conducted by Louis M. Dillon (R. 63–65, 81, 225), a duly appointed naturalization examiner (R. 62–65, 17–19, 194–196, 102, 197, 237) authorized to conduct preliminary examinations and to question, under oath, aliens who had filed Form N–400[3] (R. 62–65, 17–19, 194–196, 102, 197, 237). The oath was administered by Dillon (R. 64, 76, 79–80), and he and petitioner were the only persons present while petitioner was being questioned (R. 77–78).

At this preliminary examination, petitioner, while under oath, was asked by Dillon, "Have

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[1] The Government is filing a petition for a writ of certiorari to review the judgment below in so far as it reversed the convictions on counts 1 and 2.

[2] See 8 C. F. R. 370.1, Appendix, *infra*, p. 29.

[3] See 8 C. F. R. 60.26, 370.2, 370.8, Appendix, *infra*, pp. 28–30.

you ever been a member of the Communist Party," to which he replied in the negative (R. 64, 72–73, 75–76). No stenographic record of the examination was made, but Dillon personally typed in, simultaneously with the examination, notations, showing the results of the examination, on the triplicate copy of Form N–406, "Petition for Naturalization" (R. 64, 65, 71, 77), one of which, under the heading "Attachment tc Constitution", was: "At no time was he a member of the Communistic party" (Govt. Ex. 11, R. 81, 225).

The same day, June 6, 1946, following the preliminary examination, petitioner filed in court his "Petition for Naturalization," Form N–406 (R. 66, 69, 75).

At the trial it was stipulated that petitioner was a member of and affiliated with the Communist Party at all times during the period from 1930 to January 1, 1939 (R. 11–12, 190–191).

The preliminary examination is a purely administrative proceeding and is not one to prove the naturalization petition, which, at the time, has not yet been filed (22, 40–46, 68–69, 75–78, 81, 225, 82, 227); its purpose is to obtain information concerning the applicant's qualifications for citizenship and whether he has complied with jurisdictional requirements (see 8 C. F. R. 370.8, *infra,* p. 29), in order that the Service can (a) advise him as to whether he is qualified for citi-

zenship and, accordingly, whether he should file a petition and, if he concludes to do so, assist him in preparing his petition (40–46, 69, 81, 225), and (b) pass information on to the "designated examiner" (R. 35, 40–46, 65, 68, 76) who later conducts the preliminary "hearing," after the naturalization petition is filed with the court, and makes findings and recommendations to it (R. 22, 35, 40–46). The examiner at the preliminary examination does not make recommendations to the court (R. 35, 46).

ARGUMENT

1. Petitioner contends (Pet. 10–21) that his conviction on the third count cannot stand because there is no statutory authority for the holding of a pre-petition examination under oath of an applicant for citizenship; and that the regulation providing for such examinations (8 C. F. R. 370.8, Appendix, *infra,* p. 29) is inconsistent with Section 333 of the Nationality Act of 1940 (Appendix, *infra,* p. 26), which provides for preliminary hearings before members of the Immigration and Naturalization Service designated by the Commissioner upon petitions for naturalization filed with the courts and for the submission of findings and recommendations by the examiner to the court.

In order properly to evaluate the validity of this contention, it is necessary to examine the pertinent provisions of the Nationality Act and

the regulations thereunder in the light of the history of the administrative examination of applicants for naturalization.

The Bureau of Immigration and Naturalization was established by the Act of June 29, 1906, c. 3592, 34 Stat. 596. While that Act vested the courts with authority to naturalize aliens, it gave the Bureau "charge of all matters concerning the naturalization of aliens" (§ 1) and provided (§ 28) that "The Secretary of Commerce and Labor shall make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this Act."[4] The courts could not adequately inquire into each of the vast number of naturalization cases and, soon after the enactment of this Act, the Bureau began to develop the practice whereby its examiners conducted examinations of applicants for citizenship usually before, but sometimes after, the petition for naturalization had been filed.[5]

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[4] In 1929 the Commissioner of Immigration and Naturalization, with the approval of the Secretary of Labor, was given power to make such rules and regulations. Act of March 2, 1929, 45 Stat. 1515, § 8.

[5] See Report of the Secretary of Commerce and Labor, 1907, p. 7: "These results [prevention of fraud in naturalization cases] are accomplished by means of investigations by the naturalization examiner." Report of the Secretary of Labor, 1914, page 79: "They [naturalization examiners] have also personally investigated, prior to hearings in court, 87,840 petitioners and 169,050 witnesses." Annual Report of the Secretary of Labor, 1923, p. 74: "Under the reorganization plan, all aliens are to be examined before they become

Since 1924 the regulations have continuously provided for pre-petition examinations[6] and, since 1929, have authorized an oath in such examinations.[7] The validity of the regulations providing

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petitioners." Annual Report of the Commissioner of Naturalization, fiscal year 1923, p. 1: "Concretely, this program calls for the establishment of a contact by the field examining force with the applicant for naturalization before he files his naturalization petition, instead of after it." Annual Report of the Commissioner of Naturalization, fiscal year 1925, p. 1: "The applicant is then notified to appear with two witnesses and submit to the administrative examination preliminary to the filing of his petition. In some instances the petition is filed before this examination is made." See also House Committee Print, 76th Cong., 1st sess., Nationality Laws of the United States, Part I, p. 38.

[6] Naturalization Laws and Regulations, June 15, 1924, Rules and Regulations, Rule 3, Subdivision B, Par. 2 (pp. 38–39): "Preliminary forms 2213 and 2214 are designed to elicit the necessary information for the proper execution of a declaration of intention or petition for naturalization. Form 2213 applies solely to declarations of intention and form 2214 to petitions for naturalization. * * * Form 2214, when completed by the alien, shall be forwarded to the proper naturalization examiner, who shall thereupon assist such alien in the preparation of his petition for naturalization on the official form prescribed for the purpose, and such examiner shall examine the alien as to his qualifications for citizenship, interview witnesses, prepare affidavits, and otherwise assist such aliens to fully meet the requirements of the naturalization law." See also the present regulation, 8 C. F. R. 370.8, *infra*, p. 29.

[7] Naturalization, Citizenship and Expatriation Laws, July 1, 1929: Rules and Regulations, Rule 1, "Administrative Officers and their duties," Subdiv. G, "Investigation of naturalization and citizenship matters," Par. 1 (p. 64): "It shall be the duty of the appropriate naturalization officers or

for pre-petition examinations has not previously been challenged.[8] This long history of administrative practice is entitled to weight in appraising the validity of the present regulation. *United States* v. *Morehead,* 243 U. S. 607, 613; *United States* v. *McDaniel,* 7 Pet. 1, 13–15; *United States* v. *Bailey,* 9 Pet. 236, 255–256.

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examiners to investigate thoroughly the qualifications and eligibility of applicants for citizenship and their witnesses * * * to make the necessary reports of all the pertinent facts to the courts. * * *"

Par. 2 (p. 65): "Wherever practicable, preliminary examinations of applicants for citizenship and their witnesses will be made in person. The principal purpose of such examination is to obtain information bearing on the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes * * * Search will be made of the appropriate court and other records in establishing the qualifications of the applicant and the witnesses."

Par. 3 (p. 65): "All material statements of [applicants] for citizenship * * * and their witnesses should be in writing and under oath and signed by applicant or witnesses. * * *"

Cf. *id.*, Subdiv. O, Preliminary hearings under the Act of June 8, 1926, Par. 2: "* * * Each petitioner shall first be duly sworn by the designated examiner or officer * * * The designated examiner shall have before him at the preliminary hearing, the record of the administrative examination in such case. * * *"

See also the present regulation, 8 C. F. R. 370.8, *infra,* p. 29.

[8] The Court of Appeals said: "They were eminently reasonable and appropriate. For the courts, dealing with naturalization, could not have functioned without this administrative assistance" (R. 252–253).

Among numerous recommendations for legislation made by the Commissioner in his Annual Report for the fiscal year 1925 were two separate and distinct ones, the first (p. 25) that the "courts should be authorized to accept the results of the administrative examination by the naturalization examiners and the appearance in the court of the witnesses dispensed with," and the other (p. 26) that "Provision should be made that each applicant should appear in person with his witnesses before the naturalization examiner prior to the filing of his petition for naturalization." Neither recommendation refers to an oath.[9] Subsequently, in the Act of June 8, 1926, c. 502, 44 Stat. 709, Congress adopted the first recommendation, but it took no action on the second. The 1926 Act introduced the provisions, now embodied in Sections 333 and 334 of the Nationality Act, for sworn preliminary hearings before designated examiners [10] upon petitions for naturalization filed with the courts, and for findings and recommendations to the court, which may accept them without further testimony or hearing.

Petitioner argues that in view of the Commissioner's second recommendation referred to above

[9] The opinion below is in error in stating (R. 253) that in the latter recommendation the Commissioner asked for legislative authority for an oath in pre-petition examinations.

[10] While the 1926 Act provided that the courts should designate members of the Service as examiners, the present statute vests such authority in the Commissioner.

and the failure of Congress to adopt it, enacting instead express provisions for post-petition hearings under oath, the statute (i. e., § 333 of the Nationality Act) authorizes only one sworn preliminary examination into the qualifications of the applicant and that the provision of the regulations for a pre-petition examination under oath is inconsistent with and adds to the requirements of the statute (Pet. 13–16).

In the first place, however, we think that petitioner is not warranted in concluding that "Congress refused to authorize a pre-petition examination under oath" (Pet. 15). Prior to the 1926 Act there was no express statutory authority for any administrative examination. As we have shown, *supra,* pp. 6–8, the practice of holding such examinations was developed under the broad administrative authority to promulgate regulations in naturalization matters. In 1926, in dealing with the Commissioner's recommendation that the "courts should be authorized to accept the results of the administrative examination" and dispense with the appearance of the witnesses in court (see p. 9, *supra*). Congress made appropriate provisions regulating the procedure after the court had acquired jurisdiction, i. e., after the filing of a petition for naturalization, by providing for a hearing in proof of the petition before an examiner and for the court's acceptance of the examiner's findings and recommendation. But the fact that Congress was silent as to procedures

prior to the filing of a petition, when it knew from the Commissioner's reports (see fn. 5, p. 6, *supra*) that it had long been the practice of the Service to examine applicants before they filed their petitions, cannot be taken as disapproving such practice. On the contrary, we think that Congress' silence implied a recognition that authority for such examinations already existed.[11]

But regardless of the history of the 1926 act, we submit that the pertinent provisions of the Nationality Act of 1940 show the poverty of petitioner's contention. Section 327 (a) of that Act (*infra*, p. 23) provides that the Commissioner, under the direction of the Attorney General, "shall have charge of the administration of the naturalization laws." Section 327 (b) (*infra*, p. 24) provides in broad terms in its first clause that the Commissioner, with the approval of the

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[11] In this connection, petitioner also relies on the fact that the prior Act of May 9, 1918, c. 69, 40 Stat. 542 (now § 324 of the Nationality Act of 1940, Appendix, *infra*, p. 27) *required* a pre-petition examination of members and former members of the armed forces seeking naturalization (Pet. 12–13, 14). But the fact that Congress required such an examination in such cases is no indication that it thought that the Commissioner had no similar authority in respect of other applicants for naturalization. There was good reason for the pre-petition examination requirement in the 1918 act because that act dispensed with a declaration of intention, a certificate of arrival, and the usual residence requirements, and also because in 1918 pre-petition examinations were not held in every case (see fn. 5, p. 6, *supra*) and were not expressly authorized by the then existing regulations. Express provision for such examinations was first introduced into the regulations in 1924 (see p. 6, *supra*).

Attorney General, "shall make such rules and regulations as may be necessary to carry into effect the provisions of" the act. In its note on this subsection the President's committee on the revision of the nationality laws, consisting of the Secretary of State, the Attorney General, and the Secretary of Labor, took cognizance of the Service's long-standing practice to conduct pre-petition examinations under oath and stated that the rule-making power vested in the Commissioner by Section 327 (b) was intended to continue his authority in this regard (House Committee Print, 76th Cong., 1st sess., Nationality Laws of the United States, Part I, p. 38):

> The first part of this proposed subsection is a continuance of the present statutory authority by which the Commissioner, with the approval of the Secretary of Labor, makes the necessary rules and regulations for carrying the naturalization law into effect (sec. 28, act of June 29, 1906; as amended by sec. 8, act of March 2, 1929, 45 Stat. 1515; U. S. C., title 8, sec. 356).
>
> This subsection would recognize the practice which has been in operation since the basic Naturalization Act of 1906, providing for Federal administrative supervision of naturalization. The primary purpose in authorizing an administrative agency was to insure that an inquiry would be made in every naturalization case as to the eligibility and fitness of the applicant for

citizenship. The courts then and now have no means by which such an inquiry can be made and must rely upon the administrative officers to carry out this important function.

The necessity for the examination into the merits of naturalization applications having been recognized by Congress through the provisions made annually since 1906 to carry on this work, it is important that there be legislative recognition of the fact that it is a necessary safeguard in the granting of citizenship.[12]

The pre-petition sworn examination provided for by the regulation in question (8 C. F. R. 370.8) is calculated to facilitate the efficient administration of the naturalization laws and the

[12] Petitioner argues, on the basis of the second part of Section 327 (b), that since it specifically authorizes the Commissioner to promulgate regulations prescribing the scope and nature of the post-petition examination provided for in Section 333 (a) and limits his authority in this regard, his general rule making authority under the first clause of Section 327 (b) cannot be construed as authorizing the prescription of a pre-petition examination (Pet. 17–20). This argument ignores the fact that Section 327 (b) is in two independent parts joined by the conjunction "and." The first part authorizes such regulations as may be necessary to carry out any and all provisions of the act. As we shall show in the text, the Service has other functions in the naturalization process to which the regulation in question relates. The specific authorization in the second part of the subsection referring to post-petition examinations does not limit the Commissioner's authority under the first part to promulgate regulations which may be necessary and appropriate in the performance of the Service's other functions.

performance of specific duties enjoined upon the Commissioner.

Thus, Section 329 (b) of the Nationality Act prohibits a declaration of intention unless and until the applicant's lawful entry for permanent residence is established and a certificate is issued showing the date, place and manner of his arrival in the United States. In respect of an alien as to whom there is no registry of arrival and who is not ineligible for citizenship, a registry may be made upon a showing, *inter alia,* that he entered the United States prior to July 1, 1924,[13] and is a person of good moral character and is not subject to deportation (§ 328). Upon the making of such a record of registry, a certificate of arrival may be issued "upon application to the Commissioner in accordance with regulations prescribed by the Commissioner" (§ 329 (a)). There is therefore specific statutory authority for regulations governing the procedure upon an application for a certificate of arrival such as petitioner filed with the Service (*supra,* p. 3). The provisions of 8 C. F. R. 370.1 requiring every prospective petitioner for naturalization to file Form N–400, "Application for Certificate of Arrival and Preliminary Form for Petition for Naturalization," and of 8 C. F. R. 370.8 for a preliminary examination under oath touching the applicant's eligibility for citizenship are

[13] Petitioner was admitted for permanent residence in 1923 (R. 191).

reasonable regulations directly related to the performance of the Commissioner's specific statutory functions in issuing certificates of arrival.

There are, moreover, practical considerations supporting the reasonableness of these regulations in the administration of the naturalization laws. Although the ultimate decision rests with the court, the pre-petition examination is designed to elicit information needed by the Service in its determination of the applicant's eligibility for citizenship. It affords an opportunity after questioning the applicant regarding his qualifications thoroughly to investigate and gather evidence concerning them if the examination indicates doubts as to his eligibility. It is important to bear in mind in this connection that the Service represents the United States in naturalization matters and bears the responsibility of making recommendations to the naturalization courts, including, of course, the duty to oppose the petitions of those who are deemed not qualified and to support an adverse recommendation with evidence if need be.[14]

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[14] See § 334 (d) of the Nationality Act (Appendix, *infra*, p. 28):

"The United States shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

In addition, the pre-petition examination enables the Service to advise the alien as to his eligibility for citizenship and whether he should file a petition and to aid him in preparing his petition and in the other steps in the naturalization process.

Finally, the information elicited in the preliminary examination is passed on to the examiner designated to conduct the post-petition hearing to aid him and the court in passing on the petition (see 8 C. F. R. 373.1, Appendix, *infra,* p. 30).

In short, the pre-petition examination is a purely administrative proceeding which serves important purposes in discharging the Service's responsibilities in the administration and enforcement of the naturalization laws. It is distinct from the post-petition preliminary hearing, which is judicial in nature and is conducted by a designated examiner, similar to a referee or special master, whose findings and recommendations the court is authorized to accept as final (§ 333 (b); see *Gaglione* v. *United States,* 35 F. 2d 496 (C. A. 1)).

In view of the administrative purposes subserved by the pre-petition examination which we have outlined above, it is not, as petitioner contends (Pet. 15), a duplication of the post-petition hearing authorized by Section 333. It is not an additional requirement of proof of the applicant's qualifications to become a citizen and the regula-

tion requiring such an examination does not, therefore, add to the requirements of the statute, as did the regulations involved in *Williamson* v. *United States,* 207 U. S. 425, 458–462, and *United States* v. *George,* 228 U. S. 14, upon which petitioner relies (Pet. 7, 16). Cf. *United States* v. *Morehead,* 243 U. S. 607, 614; *United States* v. *Smull,* 236 U. S. 405, 411–412.

These same considerations support the validity of the provision of the regulation that the prepetition examination shall be under oath. Information given under oath is obviously more reliable than unsworn statements. If, as we have shown, the Commissioner is entitled to require such an examination, he is likewise entitled to prescribe an oath to insure that the information sought is true. See *United States* v. *Morehead,* 243 U. S. 604, 614; *United States* v. *Smull,* 336 U. S. 405, 410; *United States* v. *Birdsall,* 233 U. S. 223, 235; *United States* v. *Bailey,* 9 Pet. 236, 255.

2. Petitioner asserts (Pet. 21–24) that although Examiner Dillon testified on direct examination that petitioner answered "no" to the question whether he had ever been a member of the Communist Party (R. 64), Dillon admitted on cross-examination that his direct testimony was his interpretation or conclusion as to the meaning of petitioner's lengthy explanations; that a conviction for perjury may not be based solely on a witness' interpretations and conclusions as to what

was said and that as a matter of law the evidence does not establish that petitioner made the alleged statement. Dillon did not, we submit, make any such admission. He testified that he had no independent recollection of the questions asked of, and the responses made by, petitioner apart from (a) the practice in every case to ask the applicant if he had ever been a member of the Communist Party and (b) his memory as refreshed by Government Exhibit 11, on which he had typed, as he questioned petitioner, "At no time was he a member of the Communistic party" (R. 65–67, 71, 79, 81, 225). He further testified, on direct examination, after refreshing his memory from that exhibit, that he asked petitioner "if he was ever a member of the Communist Party" and that "His answer was 'no' " (R. 64).

Although Dillon did testify, on cross-examination, that he came to the conclusion that petitioner meant that he was not a member of the Communist Party (R. 73) and that petitioner expanded on his views "about his affiliations and about what organizations he belonged to" (R. 72), he did not admit that his conclusion was derived simply from petitioner's lengthy explanations. In fact, he repeatedly asserted, under vigorous cross-examination, that petitioner was asked the direct question as to whether he had ever been a member of the Communist Party and that he replied in the negative (R. 72–74).

In reply to the question, "did you get from Obermeier * * * a rather lengthy explanation to any of the questions that you asked," Dillon stated, "No. There is no general discussion on the idea of Communists at all" (R. 72). To the question, have you "any specific memory of asking the direct question and getting a direct answer," Dillon replied: "He answered in every case—he was asked a direct question, 'Have you ever been a member of the Communist Party,' or, 'Were you a member of the Communist Party'" (R. 73). Dillon's answer to the question, "You wrote the answer from the long explanation that you thought was the answer," was "No, as the result of my question to him, 'Were you ever a member of the Communist Party,' I wrote the answer down, 'No.'" (R. 73). Next following that question Dillon was asked, "Was that what you came to the conclusion of after you got a long explanation from Mr. Obermeier," to which he replied: "No. My conclusion was the result of my direct question to him." (R. 73). Again on redirect examination, Dillon testified that petitioner answered "No" to the question "Have you ever been a member of the Communist Party" (R. 75–76).

Petitioner contends that the evidence is also insufficient to establish that he was placed under oath at the preliminary examination. Dillon testified, however, (a) that he put petitioner under oath (R. 64), and (b) that, although he

had no distinct recollection, at the time of the trial, of administering the oath, it was "the" practice, and "his" practice, to administer an oath in every preliminary examination (R. 79–80).[15]

The trial court, as the trier of the facts, found (R. 238):

> Finally, defendant contends with reference to Count Three, that defendant's guilt has not been proved beyond a reasonable doubt. I have observed Examiner Dillon on the witness stand and his testimony impresses me as being true. After refreshing his recollection from Government's Exhibit 11, which he himself typed as he questioned the defendant and signed, he clearly and unequivocally showed that he placed the defendant under oath and asked him the specific question and received the false answer set forth above. While I draw no conclusion from the failure of defendant to testify, there is no evidence in the record which contradicts Dillon's testimony.

The Court of Appeals thought "the evidence enough to sustain the trial judge's * * * findings" (R. 248). There is therefore no occasion for further review of this question by this Court.

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[15] The regulation (8 C. F. R. 370.8) required that "preliminary examinations of applicants for naturalization * * * shall be made * * * under oath" and this requirement had been in effect for 17 years (see p. 7, *supra*).

CONCLUSION

The decision below is correct and the case presents no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1951.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Nationality Act of 1940, c. 876, 54 Stat. 1137, as amended, c. 534, 60 Stat. 417, provides in pertinent part:

> SEC. 305 (8 U. S. C. 705):
>
> No person shall hereafter be naturalized as a citizen of the United States—
>
> * * * * *
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—
>
> (1) the overthrow by force or violence of the Government of the United States or of all forms of law; * * *
>
> * * * * *
>
> The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes.
>
> SEC. 324 (8 U. S. C. 724):
>
> (a) A person, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions,

may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that—

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service.

SEC. 327 (8 U. S. C. 727):

(a) The Commissioner, or, in his absence, a Deputy Commissioner, shall have charge of the administration of the naturalization laws, under the immediate direction of the Attorney General, to whom the Commissioner shall report directly upon all

naturalization matters annually and as otherwise required.

(b) The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this chapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.

* * * * *

(e) Members of the Service may be designated by the Commissioner or a Deputy Commissioner to administer oaths and to take depositions without charge in matters relating to the administration of the naturalization and citizenship laws. In cases where there is a likelihood of unusual delay or of hardship, the Commissioner or a Deputy Commissioner may, in his discretion, authorize such depositions to be taken before a postmaster without charge, or before a notary public or other person authorized to administer oaths for general purposes.

SEC. 328 (8 U. S. C. 728):

(a) The Commissioner shall cause to be made, for use in complying with the re-

quirements of this chapter, a registry of each person arriving in the United States after the effective date of this Act, of the name, age, occupation, personal description (including height, complexion, color of hair and eyes, and fingerprints), the date and place of birth, nationality, the last residence, the intended place of residence in the United States, the date and place of arrival of said person, and the name of vessel or other means of transportation, upon which said person arrived.

(b) Registry of aliens at ports of entry required by subsection (a) of this section may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner, in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, that such alien—

(1) Entered the United States prior to July 1, 1924;

(2) Has resided in the United States continuously since such entry;

(3) Is a person of good moral character; and

(4) Is not subject to deportation.

(c) For the purposes of the immigration laws and naturalization laws an alien, in respect of whom a record of registry has been made as authorized by this section, shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of such alien's entry.

SEC. 329 (8 U. S. C. 729):

(a) The certificate of arrival required by this chapter may be issued upon appli-

cation to the Commissioner in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, upon the making of a record of registry as authorized by section 328 of this Act.

(b) No declaration of intention shall be made by any person who arrived in the United States after June 29, 1906, until such person's lawful entry for permanent residence shall have been established, and a certificate showing the date, place, and manner of arrival in the United States shall have been issued. It shall be the duty of the Commissioner or a Deputy Commissioner to cause to be issued such certificate.

SEC. 333 (8 U. S. C. 733):

(a) The Commissioner or a Deputy Commissioner shall designate members of the Service to conduct preliminary hearings upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such court. For such purposes any such designated examiner is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpena witnesses, and to administer oaths, including the oath of the petitioner to the petition for naturalization and the oath of petitioner's witnesses.

(b) The findings of any such designated examiner upon any such preliminary hearing shall be submitted to the court at the final hearing upon the petition with a recommendation that the petition be granted, or denied, or continued, with the reasons therefor. Such findings and recommendations shall be accompanied by duplicate

lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by the designated examiner. The judge to whom such findings and recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of such lists shall thereafter be filed permanently of record in such court and the duplicate list shall be sent by the clerk of such court to the Commissioner.

SEC. 334 (8 U. S. C. 734):

(a) Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant, and, except as provided in subsection (b) of this section, the witnesses shall be examined under oath before the court and in the presence of the court.

(b) The requirement of subsection (a) of this section for the examination of the petitioner and witnesses under oath before the court and in the presence of the court shall not apply in any case where a designated examiner has conducted the preliminary hearing authorized by subsection (a) of section 333; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath

before the court and in the presence of the court.

* * * * *

(d) The United States shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

SEC. 346 (8 U. S. C. 746):

(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—

(1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.

The pertinent regulations under the Nationality Act are:

SEC. 60.26, 8 C. F. R. (12 Fed. Reg. 5069):

Authority to administer oaths and take depositions. All patrol inspectors, immigrant inspectors, naturalization examiners, and officers of the Immigration and Naturalization Service of a higher grade are hereby authorized to administer oaths and to take depositions without charge in mat-

ters relating to the administration of the naturalization and citizenship laws.

SEC. 370.1, 8 C. F. R. (12 Fed. Reg. 5172):

Preliminary form; to whom sent. Each prospective petitioner for naturalization shall be required to fill out properly and sign preliminary application Form N–400 and submit it, with three photographs as prescribed in Part 364 of this chapter and the applicant's declaration of intention if required, to the immigration and naturalization office prescribed in sec. 60.30 (a) of this chapter.

SEC. 370.2, 8 C. F. R. (12 Fed. Reg. 5172):

Notification to appear and file petition for naturalization. Following the submission of the preliminary Form N–400, as described in sec. 370.1, the applicant will be notified when and where to appear to file the petition for naturalization.

SEC. 370.8, 8 C. F. R. (12 Fed. Reg. 5172):

Preliminary naturalization examinations; facts to be ascertained; manner of conducting and uniformity; limitation. Wherever practicable, preliminary examinations of applicants for naturalization and their witnesses shall be made in person and under oath. The applicant and each witness shall be interviewed separately and apart from one another. The purpose of such examinations shall be to obtain accurate and material information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law; is mentally and morally qualified

for citizenship; is attached to the principles of the Constitution of the United States, and is well disposed to the good order and happiness of the United States.

SEC. 373.1, 8 C. F. R. (12 Fed. Reg. 5173):

(a) Preliminary hearings conducted under section 333 of the Nationality Act of 1940 shall be open to the public. Wherever possible, a member of the Service other than the person who conducted the preliminary examination, shall serve as designated examiner. Preliminary hearings shall be conducted in person by the designated examiner, or officer, and the petitioner and his witnesses shall be present. The petitioner and witnesses shall first be duly sworn. The designated examiner shall have before him at the preliminary hearing the record of the preliminary examination in each case. He shall not, however, be limited to the information contained in such record, but may use any material evidence or data received from any other source; and he may present and examine other witnesses than those produced by the petitioner. * * *

* * * * *

(d) The designated examiner or officer shall prepare in triplicate his findings and recommendations for presentation to the court on Forms N–480 or N–481 for petitions recommended to be granted, on Form N–483 for petitions recommended to be continued, and on Form N–484 for petitions recommended to be denied. These findings and recommendations shall be signed by the officer in attendance at the final hearing and submitted to the judge of the court at or before the final hearing.

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IN THE

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OCTOBER TERM, 1950

No. 505

MICHAEL OBERMEIER,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF IN REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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Opinion Below

The opinion below of the Court of Appeals has now been reported at 186 F. (2d) 243.

ARGUMENT

I

Although the Government takes the position that the petition for certiorari herein should be denied, the fifteen pages of its brief devoted to elaborate and tenuous argu-

ments to justify the decision of the Court below are in striking contrast to this conclusion. In short, the Government's brief in opposition demonstrates two things: First, that the case is of great importance in the administration of the naturalization laws, and, second, that the question here involved has never been authoritatively decided.

II

In attempting to find statutory authority for the oath here in question, the Government has completely abandoned the principal ground upon which the Court of Appeals based its decision that the oath was authorized by law.

The Court of Appeals held (R. 254-5) that the oath was authorized by the *second* clause of the first sentence of Section 327(b) of the Nationality Act of 1940 (8 U. S. C. Section 727(b)), which authorizes the Commissioner to "prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts."

The Government has specifically conceded (in footnote 12 on page 13 of its brief in opposition) that this provision is one "referring to post-petition examinations."

III

As far as statutory authority for the oath is concerned, the Government now relies solely on the Commissioner's general rule-making power contained in the *first* part of Section 327(b) of the Nationality Act (see pp. 11-14 of the Government's brief in opposition). But to sustain this argument, in view of the decisions of this Court in the cases of *Williamson* v. *United States,* 207 U. S. 425 and *United States* v. *George,* 228 U. S. 14, the Government finds itself obliged to establish (Br. 16-17) that the oath here in question, which was administered in a pre-petition preliminary examination, does not duplicate the oath in the

post-petition hearing specifically prescribed by Congress in Section 333 of the Act (8 U. S. C. Section 733).

The Government attempts to do this by trying to show that the pre-petition examination under oath "is calculated to facilitate the administration of the naturalization laws and the performance of specific duties enjoined upon the Commissioner" (Br. 13-14). Thus the Government argues that the pre-petition examination under oath serves four purposes:

1. That it "affords an opportunity after questioning the applicant regarding his qualifications thoroughly to investigate and gather evidence concerning them" (Government's brief, p. 15).

2. That it is "directly related to the performance of the Commissioner's specific statutory functions in issuing certificates of arrival" (Government's brief, p. 15).

3. That it "enables the Service to advise the alien as to his eligibility for citizenship * * * and to aid him in preparing his petition", etc. (Government's brief, p. 16).

4. That "the information elicited in the preliminary examination is passed on to the examiner designated to conduct the post-petition hearing to aid him and the Court in passing on the petition" (Government's brief, p. 16).

None of these arguments has any merit.

1. The evidence adduced by the Government shows that the preliminary examination under oath prior to the filing of a petition is not used as the basis of any investigation and gathering of evidence with respect to the petitioner's qualifications. That evidence establishes that the investigation of petitioners is made *after the post-petition hearing under oath* conducted by a designated examiner in accordance with Section 333 of the Act (8 U. S. C., Section 733). It also shows that the usual practice is to hold the pre-petition examination under oath and the post-petition

hearing under oath on the same day, so that it would obviously be impossible to conduct any investigation based on the pre-petition examination prior to the holding of the post-petition hearing.

Milton H. Salomon, the designated examiner who questioned petitioner on May 26 and June 2, 1945, when called as a witness by the Government, testified upon direct examination as follows (R. 21-22):

> "Q. When you were acting as designated examiner and prior to your commitment on your duties as investigator what were your duties generally when acting as designated examiner? * * * A. I conducted preliminary hearings held in connection with petitions for naturalization filed by aliens.
>
> "*Thereafter* I would direct the investigation which was to be made and would make a recommendation to the naturalization court as to whether or not such petition should be finally granted or denied.
>
> "Q. *Your investigation followed the filing of the petition for naturalization?* A. *That is correct.*
>
> "Q. And the preliminary examination that is held is something different from a preliminary hearing, is it not? A. That is correct.
>
> "Q. The preliminary examination is held at the time the petition is sworn to, is that correct? A. It precedes the filing of the petition. It is held by the preliminary examiner and thereafter the petition is filed with the court and then the designated examiner conducts his preliminary hearing. *They are all done on the same day as a rule*, although there are exceptions" (italics supplied).

2. The preliminary examination under oath prior to the filing of a petition is not used as the basis for the issuance of certificates of arrival.

In its argument on this point, the Government attempts to confuse the issues by making reference to aliens as to whom there is no registry of arrival. In the case of such aliens, the regulations provide an elaborate procedure, entirely different from the pre-petition examination here involved, whereby they may be placed upon the registry

of aliens and receive a certificate of lawful entry (8 C. F. R. Sections 362.1-362.14). And 8 C. F. R. Section 363.6 specifically provides that where an applicant for a declaration of intention or a petition for naturalization is without record for his lawful entry, he shall be advised to apply for registry in accordance with that procedure.

8 C. F. R. Sections 370.1 et seq. apply only to prospective petitioners who either do not need certificates of lawful entry or already have them. Accordingly, at the time when an application for a petition (Form N-400) is filed, the furnishing of a certificate of arrival or of lawful entry is a mere ministerial act as to which an oath is not appropriate. The applicant for naturalization has already established either that he is entitled to such certificate or that he does not need one. The procedure set forth in 8 C. F. R. Sections 370.1 et seq. clearly is not for the purpose of establishing the petitioner's right to a certificate of arrival. Indeed, Section 370.8 of the regulations, under which the preliminary pre-petition examination here in question was conducted, shows on its face that it has nothing to do with certificates of arrival but rather is concerned with the applicant's qualifications to become a naturalized citizen.

3. The oath administered in the pre-petition examination is obviously unnecessary in aiding the alien in preparing his petition, etc. Insofar as the pre-petition examination is for the purpose of aiding the alien, no oath is appropriate because it is the alien's interest, rather than that of the Government, that is involved and that might be prejudiced by the making of a false statement.

4. The preliminary pre-petition examination under oath cannot be justified on the ground that the information there elicited is passed on to the designated examiner, who holds the post-petition hearing pursuant to Section 333 of the Act (8 U. S. C. Section 733). As we have already indicated, the record establishes that the two examinations

are generally held on the same day. We have shown in our main brief in support of our petition that the two examinations cover the identical subject matter. First, the petitioner is questioned under oath as to his qualifications *prior* to the filing of his petition and then, forthwith, usually on the same day, he is questioned under oath again as to his qualifications *after* his petition has been filed. No useful purpose is served by the pre-petition examination under oath in these circumstances. All it does is to duplicate the post-petition hearing under oath for which Congress has expressly provided. In so doing, it is inconsistent with the statute, and under the doctrine of the *Williamson* and *George* cases, *supra,* cannot be used as the foundation of a prosecution for perjury.

In an attempt to draw a distinction where there is no real difference, the Government argues that the post-petition hearing is a *judicial* proceeding and that the pre-petition examination is an *administrative* proceeding. But this is just playing with words. It does not avoid the duplication which vitiates the oath upon which petitioner's conviction was based. The Government, thus, has failed in its effort to show that the pre-petition examination under oath facilitates "the efficient administration of the naturalization laws and the performance of specific duties enjoined upon the Commissioner."

IV

In connection with the legislative history of the Nationality Act of 1940, the Government argues (at pp. 11-13 of its brief in opposition) that "the President's committee on the revision of the nationality laws * * * took cognizance of the Service's longstanding practice to conduct pre-petition examinations under oath and stated that the rule-making power vested in the Commissioner by Section 327(b) was to continue his authority in this regard." To sustain this argument, the Government quotes (Br. 12-13) an excerpt from the note to Section 327(b) written by that Committee.

We contend that this note, when read in its entirety, clearly shows:

1. That it has no reference whatever to pre-petition examinations.

2. That it refers to post-petition hearings upon the basis of which recommendations are made to naturalization courts.

3. That its purpose was to manifest an intention that such post-petition hearings be uniform throughout the United States.

For the convenience of the Court, we are printing the full text of the note as an appendix to this brief.

Conclusion

It is respectfully submitted that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

Sidney E. Cohn,
Paul O'Dwyer,
Attorneys for Petitioner.

APPENDIX

President's Committee on the Revision of the Nationality Laws

Note to Proposed Section 327(b)

(House Committee Print, 76th Cong., 1st Sess., Nationality Laws of the United States, Part 1, p. 38)

The first part of this proposed subsection is a continuance of the present statutory authority by which the Commissioner, with the approval of the Secretary of Labor, makes the necessary rules and regulations for carrying the naturalization law into effect (sec. 28, act of June 29, 1906; as amended by sec. 8, act of March 2, 1929, 45 Stat. 1515; U. S. C., title 8, sec. 356).

This subsection would recognize the practice which has been in operation since the basic Naturalization Act of 1906, providing for Federal administrative supervision of naturalization. The primary purpose in authorizing an administrative agency was to insure that an inquiry would be made in every naturalization case as to the eligibility and fitness of the applicant for citizenship. The courts then and now have no means by which such an inquiry can be made and must rely upon the administrative officers to carry out this important function.

The necessity for the examination into the merits of naturalization applications having been recognized by Congress through the provisions made annually since 1906 to carry on this work, it is important that there be legislative recognition of the fact that it is a necessary safeguard in the granting of citizenship.

While the Constitution requires a "uniform" rule of naturalization, the fact that more than 2,000 Federal and State courts have naturalization jurisdiction, and the lack of any statutory provision by which the Immigration and

Naturalization Service might prescribe the scope and nature of the examination to be accorded petitioners for naturalization, have resulted in much inconsistency, confusion, and contrariety of opinion and decision in this field. There have been wide differences of opinion among the many courts as to the nature and extent of the examination which applicants for naturalization should be given, and such differences even among the various naturalization judges in a single court. There has also been at times a lack of agreement as between the judges and naturalization examiners. As it is hopeless to expect that the judges of the more than 2,000 courts, all of coordinate jurisdiction, would, acting independently, be able to arrive at a type of examination which would be uniform throughout the United States, it is suggested that the Commissioner of Immigration and Naturalization be authorized to prescribe the scope and nature of such examination. This would not only place the authority where it must in any event be normally exercised but would have the great merit of providing for a uniform test throughout the United States and in all of the naturalization courts.

It is felt, however, that there should be definite assurance that such examination would be confined to the essential elements necessary to be considered in determining the fitness for citizenship of any applicant. The proposed measure, therefore, specifies that such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and the other qualifications to become a naturalized citizen as required by law. The administrative examination would not, of course, prevent further interrogation of petitioner and witnesses by the court. (See comment in sec. 332.)

While the statutory authority which is now given naturalization examiners to conduct preliminary hearings, take testimony, and make recommendations to the court for the

admission or denial of petitions filed in the United States district courts, is a move in the direction of a more uniform naturalization law, a test which would be the same in every court throughout the United States would give a tremendous impetus in approaching the required uniformity of procedure.

The confidence the judiciary reposes in the members of the Naturalization Service is indicated by the acceptance by the judges of United States district courts of the recommendations of the naturalization examiners based upon their hearings before the courts, in 99 percent of all cases submitted. These cover approximately 800,000 cases since 1926, when Congress authorized this procedure.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 557

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL OBERMEIER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in so far as it reversed respondent's conviction on the first two counts of a three-count indictment, charging him with knowingly making false statements under oath in a matter relating to naturalization and citizenship, on the ground that prosecution of the offenses charged in those counts was barred by limitations.

OPINION BELOW

The opinion of the Court of Appeals (R. 245-270) is not yet reported. The opinion of the District Court (R. 230-238) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1950 (R. 271). On January 17, 1951, by order of Mr. Justice Jackson, the time within which to file this petition for a writ of certiorari was extended to February 18, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the clause in Section 21 of the 1948 statute revising Title 18, U.S.C., effective September 1, 1948, preserving "rights or liabilities now existing," and the general saving statute (1 U.S.C. 109) operated to preserve (after the reduction in the 1948 revision of the period of limitation to three years) the former five year period which was applicable at the time of the commission of the offenses charged in counts 1 and 2.

2. Whether the offense of knowingly making a false statement under oath in a naturalization proceeding is within the purview of the wartime statute suspending the running, until three years after the termination of hostilities as proclaimed by the President (i.e., until December 31, 1949), of any

statute of limitations applicable to any offense "involving fraud or attempted fraud against the United States * * * in any manner."

STATUTES INVOLVED

Section 346 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1163, 8 U.S.C. 746, which was in effect at the time of the offenses charged in counts 1 and 2, provided in pertinent part:

> (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> (1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.[1]
>
> * * * * *
>
> (d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> * * * * *

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[1] Repealed and superseded by 18 U.S.C. (1948 rev.) 1015(a): "Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens; * * *

* * * * *

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

> (g) No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime.

On September 1, 1948, prior to the return of the indictment on September 28, 1948, the 1948 revision of Title 18, U.S.C., became effective. Section 21 of the Act revising Title 18 (June 25, 1948, 62 Stat. 683) provides:

> The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.

Among the sections so repealed was the limitation provision of Section 346(g) of the Nationality Act of 1940, *supra*.

Section 3282 of the 1948 revision of Title 18 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.[2]

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[2] This section now covers the offense of knowingly making a false statement in a naturalization proceeding. As the Reviser's Note to Section 3282 states:

"Section 582 of title 18, U.S.C., 1940 ed., and section 746(g)

1 U.S.C. 109, which was enacted into positive law by the act of July 30, 1947, 61 Stat. 633, provides:

> *Repeal of statutes as affecting existing liabilities.* The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. * * *

18 U.S.C. (1948 rev.) 3287 reads in part as follows:

> *Wartime suspension of limitations.* When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as

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of title 8, U.S.C., 1940 ed., Aliens and Nationality, were consolidated. * * *

* * * * *

"In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746 (g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner."

proclaimed by the President or by a concurrent resolution of Congress.[3]

STATEMENT

On September 28, 1948 (R. 2), respondent, an alien, was indicted (R. 7-8) on three counts charging that he knowingly and falsely stated under oath in matters relating to his naturalization that he had not at any time been a member of the Communist Party, in violation of Section 346(a)(1) of the Nationality Act of 1940 (*supra*, p. 3). The alleged false statements were made on May 26, 1945, June 2, 1945, and June 6, 1946, respectively, the first two more than three years but less than five years prior to the date the indictment was returned and the third within three years prior to that date.

Before, during, and after his trial before the court, a jury having been waived (R. 230), respondent moved to dismiss counts 1 and 2 on the ground that prosecution of the offenses alleged therein was barred by the three-year period of limitation prescribed by 18 U.S.C. (1948 rev.) 3282, *supra*, p. 4 (R. 3, 100-101, 234-235). At the opening of the trial respondent admitted by stipulation that he was a member of and affiliated with the Communist Party of the United States from 1930 to January 1, 1939 (R. 9-12, 190-191). He was found guilty on all three counts and sentenced to two

[3] The President proclaimed the termination of hostilities on December 31, 1946. 12 F. R. 1.

years' imprisonment on each, to run concurrently, and fined $1,000 on the first count (R. 4, 188).

On appeal to the Court of Appeals for the Second Circuit, the judgment was affirmed as to the third count,[4] but reversed as to the first two on the ground that prosecution of the offenses charged therein was barred by limitations. The court held that neither the general saving statute (1 U.S.C. 109, *supra,* p. 5) nor the saving clause in Section 21 of the Act of June 25, 1948, revising Title 18, U.S.C., which became effective September 1, 1948, operated to preserve the former five-year period of limitation prescribed for such offenses by Section 346(g) of the Nationality Act of 1940 (*supra,* p. 4) in the face of the express repeal of that provision by Section 21 and the substitution of the general three-year period prescribed by Section 3282 of the 1948 revision. The court concluded, upon the basis of a review of the history of saving clauses since the enactment of the Revised Statutes, that both Section 21 and 1 U.S.C. 109 preserve only substantive rights and liabilities and not statutes of limitations, which, the court said, are usually "considered no part of a 'right' or 'liability,' but as affecting the 'remedy' only." The court also rejected the Government's contention that the Wartime Suspension of Limitations Act

[4] Respondent has filed a petition for a writ of certiorari (No. 505) to review the judgment below in so far as it affirmed his conviction on count 3, and the Government has filed a brief in opposition thereto.

(18 U.S.C. (1948) 3287, *supra*, pp. 5-6) preserved the right to prosecute the first two counts. The court thought that fraud is not an ingredient of of the offense of false swearing in a naturalization proceeding and that the suspension act is therefore inapplicable. (R. 257-270.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the saving clause in Section 21 of the Act of June 25, 1948, revising Title 18, U.S.C., does not preserve the five-year period of limitations which was applicable at the time of the offenses charged in counts 1 and 2 of the indictment.

2. In holding that the general saving statute, 1 U.S.C. 109, does not preserve the five-year period of limitations which was applicable at the time of the offenses charged in counts 1 and 2.

3. In holding that the wartime suspension of limitations statute does not apply to the offense of knowingly making a false statement under oath in a naturalization proceeding.

4. In reversing respondent's conviction on counts 1 and 2.

REASONS FOR GRANTING THE WRIT

1. *The question is important.* The decision below, in so far as it reversed respondent's conviction on counts 1 and 2, presents a question of substantial importance in determining the period of limitations applicable to many offenses committed before

but prosecuted after the 1948 revision of the Criminal Code. The problem is of a recurring nature, as is emphasized by the fact that the ruling below is in direct conflict with the decision of the United States District Court for the Northern District of California in *United States* v. *Bridges,* 86 F. Supp. 922. The indictment in that case charged the defendants in the first count with a conspiracy, ending more than three years prior to the return of the indictment on May 25, 1949 (see 86 F. Supp. at 932), to defraud the United States in the proper administration of the naturalization laws by falsely and fraudulently stating to the court in Bridges' naturalization proceeding that he had never belonged to the Communist Party. The second count charged Bridges alone with falsely swearing before the naturalization court on September 17, 1945, that he had never been a member of the Party, in violation of Section 346(a)(1) of the Nationality Act of 1940, 8 U.S.C. 746(a)(1) (*supra,* p. 3), and the third count charged Bridges' co-defendants with encouraging, aiding, advising, and assisting him in obtaining a certificate of naturalization, knowing that it was procured by means of such false and fraudulent representations concerning Bridges' membership in the Party, in violation of Section 346 (a)(5) of the Nationality Act, 8 U.S.C. 746(a)(5). The two substantive counts thus involved the identical situation involved in the instant case, i.e., the indictment charged of-

fenses committed while the five-year limitation statute (Section 346(g) of the Nationality Act, 8 U.S.C. 746(g), *supra*, p. 4) was in effect but was not returned until more than three years later and after the effective date of the 1948 revision, which reduced the period to three years.

In overruling the defendants' plea of limitations based upon Section 3282 of the 1948 revision of Title 18 (*supra*, p. 4), the District Court in the *Bridges* case held (1) that the wartime suspension of limitations statute (18 U.S.C. (1948) 3287, *supra*, pp. 5-6) applied to both the conspiracy and substantive charges, and (2) that Section 21 of the Act of June 25, 1948 (*supra*, p. 4), revising Title 18 preserved as to the substantive counts the five-year period of limitations provided by Section 346(g) of the Nationality Act.[5] The importance of the question under the suspension statute was recognized by the Court of Appeals for the Ninth Circuit in its opinion vacating an order of the District Court revoking Bridges' bail pending appeal from his conviction; it said that "a seriously debatable question is presented for determination by this court and probably by the Supreme Court." *Bridges* v. *United States*, 184 F. 2d 881, 883-884.

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[5] The court therefore found it unnecessary to consider the Government's additional contention that the general saving statute, 1 U.S.C. 109, preserved the prior five year period of limitations.

2. *The decision below is erroneous.*

(a) *Section 21.* The provisions defining the offense here involved (8 U.S.C. 746(a)(1)) and prescribing a five-year period of limitations therefor (8 U.S.C. 746(g)) were both expressly repealed by Section 21 of the Act of June 25, 1948, 62 Stat. 683, 862, enacting the new Criminal Code. But Section 21 contains a saving clause which provides that "Any rights or liabilities now existing" under the repealed sections "shall not be affected by this repeal." The acts of which respondent was convicted were committed in 1945 while these provisions were in effect, and there is no dispute that the saving clause of Section 21 preserved the substantive provision of 746(a)(1). The issue here is whether it also preserved the five-year period of limitations applicable to offenses committed prior to its enactment, as the Government contends, or whether the new three-year period prescribed by the 1948 revision (18 U.S.C. 3282) is applicable even to offenses committed more than three but less than five years before its effective date, as the Court of Appeals held.

If the court below is right in its construction, it would mean that the enactment of the new codification on June 25, 1948, automatically closed the door to prosecutions of all offenses falling within this category. Surely if Congress had intended so drastic an amnesty, it would have made explicit provision therefor. On the contrary, the saving

clause of Section 21 expresses a clear legislative intention not to affect existing "rights or liabilities"—which must include not only the substantive "liability" of the defendant but also the "right" of the Government to prosecute within the period of limitations in force when the offense was committed. The word "liability" in Section 21, if given a practical, common-sense construction, certainly includes the "liability" of a defendant to be tried and, if convicted, punished in accordance with the terms of the substantive provision defining the offense. It makes an absurdity of Section 21 to attribute to Congress a purpose of preserving the criminal character of a defendant's acts, and at the same time giving him an absolute immunity from prosecution. Yet that is the practical result of the construction made by the court below.

The court below laid great emphasis on the fact that in enacting the Revised Statutes of 1874, and again in enacting the Criminal Code in 1909, Congress included, in addition to a general saving provision, another provision specifically preserving preexisting periods of limitations applicable to offenses committed prior to the revision and repeal of the old law.[6] From this the court reasoned that since special provisions were deemed necessary on those occasions to save statutes of limitations

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[6] These sections of the Revised Statutes and the Criminal Code are quoted in the opinion below, R. 259-261.

in prosecutions under the old law, if Congress had intended to save the old five-year statute of limitations (8 U.S.C. 746(g)), it would have so stated in framing Section 21 of the 1948 Act. The difficulty with this reasoning is that it takes no account of the broad and all-embracing language of Section 21 to include "any rights or liabilities now existing" under the repealed substantive provisions. The comprehensive breadth of this language itself reflects a legislative purpose of preserving the complete status quo with respect to alleged offenses which might be prosecuted under the repealed provisions. To be sure, no further illumination of the scope and design of Section 21 is to be found in the Reviser's Notes or other legislative materials. It seems to us, however, that this silence in the legislative history does not support the construction of Section 21 urged by respondent. On the contrary, in view of the practical incongruities which result from acceptance of respondent's construction, it should be adopted only if compelled by the clearest evidence that such was the purpose of Congress—evidence which is wholly lacking here. As the District Court in the *Bridges* case said on this point (86 F. Supp. 922, 927):

> If defendant's contention were correct then we would be confronted with the anomalous situation of keeping alive a right, while at the same time failing to preserve the remedy afforded by the applicable Statute of Limitations.

The ruling below appears to conflict in principle with *Lovely* v. *United States,* 175 F. 2d 312 (C.A. 4), certiorari denied, 338 U.S. 834. In the latter case the Court of Appeals for the Fourth Circuit held that the penalty for rape prescribed by the old law is saved by Section 21 where the offense was committed before the recodification. The court there construed the word "liability" in Section 21 in its broadest sense to include the punishment, or remedy as well as the substantive crime. Cf. *United States* v. *Reisinger,* 128 U.S. 398, 403. The broad construction of Section 21 made by the court in the *Lovely* case is in sharp contrast with the narrow view adopted by the court below in the present case, construing "liability" as not including anything except the bare bones of the substantive offense.

None of the authorities cited by the court below warrants the holding that Section 21 does not preserve the effect of the old five-year statute of limitations in force when the crimes charged were allegedly committed. To hold that the new three-year period prescribed by the 1948 revision is applicable to such antecedent offenses is to give a retroactive effect to a provision which in terms does not appear to have any such backward application, in disregard of the familiar canon of construction that "all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to

that effect." *Fullerton-Krueger Lumber Company* v. *Northern Pacific Railway Co.*, 266 U.S. 435, 437; *Russell* v. *United States*, 278 U.S. 181, 187; *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 164; *Hiatt* v. *Hilliard*, 180 F. 2d 453 (C.A. 5).

Section 3282 of the 1948 revision, prescribing the new three-year general period of limitations, contains no language whatsoever indicating a purpose to give it retroactive effect. On the contrary its text, quoted below,[7] affirmatively shows that it was intended to apply only to such offenses as would be committed after its enactment.[8]

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[7] "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense *shall have been committed.*" [Italics supplied.]

[8] Even apart from Section 21, the general saving statute, 1 U.S.C. 109, has the effect of saving the five-year period of limitations in force at the time the offenses here involved were committed. This provision, quoted, *supra*, p. 5, has been held by the Court of Appeals for the Fifth Circuit as saving the provision under the old Criminal Code relating to commutation of sentence for good conduct, 18 U.S.C. 710. The court refused to apply the new Code sections (18 U.S.C. 4161 and 4165) to time earned for good conduct before their enactment, applying the rule that a statute should not be given retroactive effect unless Congress has clearly directed otherwise. *Hiatt* v. *Hilliard*, 180 F. 2d 453. The Court of Appeals for the Second Circuit has also held that where a repealed section of the Criminal Code provided for a longer sentence than the new section which came into effect after the commission of the crime, the longer sentence was saved by virtue of Section 109. *United States* v. *Kirby*, 176 F. 2d 101 (C.A. 2). It would seem that if such elements affecting the "remedy" are saved, so, too, is the statute of limitations which the court below stated is part of the "remedy".

(b) *The Wartime Suspension of Limitations Act.* A further basis for sustaining the first two counts of the indictment is to be found in the following provision of the Wartime Suspension of Limitations Act:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not * * * shall be suspended until three years after the termination of hostilities * * *.

This language had the effect of tolling the running of the statute of limitations until December 31, 1949,[9] even if the three-year statute in the new Criminal Code should be deemed to have replaced the five-year statute in effect under the old law.

The court below held that fraud is not an ingredient of the offense of false swearing as defined by the statute and that therefore the suspension statute does not apply, citing *United States* v. *Noveck,* 271 U. S. 201; *United States* v. *McElvain,* 272 U.S. 633; and *United States* v. *Scharton,* 285 U.S. 518. None of those cases, however, involved false swearing in a naturalization proceeding, but rather were concerned with perjury and false statements in income tax returns.

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[9] The termination of hostilities was proclaimed by the President of the United States on December 31, 1946 (12 F.R. 1).

In *United States* v. *Gottfried,* 165 F. 2d 360 (C.A. 2), certiorari denied, 333 U.S. 860, rehearing denied, 333 U.S. 883, the Second Circuit held that a prosecution under the so-called False Claims Statute (Section 35(A) of the Criminal Code, 18 U.S.C. [1946] 80) for making false and fraudulent statements to the O.P.A. in obtaining sugar rations [10] was saved by the suspension statute as involving fraud. Emphasizing the broad connotation of "fraud," the court there said that (165 F. 2d at 368):

> * * * it has been the law, at least since 1910, that in the statute under which this indictment was drawn, "fraud" includes any conduct, "calculated to obstruct or impair its" (the United States') "efficiency and destroy the value of its operations and reports." We see no reason for reading the words, "defrauding the United States" in the statute of limitations now in question less comprehensively; certainly there was not enough ground for that in the debates of Congress. Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar.

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[10] The part of Section 35(A) upon which the prosecution was based read: "Whoever shall * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be * * *."

In *Marzani* v. *United States,* 168 F. 2d 133, affirmed and reaffirmed by an equally divided court, 335 U.S. 895, 336 U.S. 922, on the other hand, the Court of Appeals for the District of Columbia Circuit said, by way of dictum, upon the basis of its interpretation of the *Noveck, McElvain* and *Scharton* decisions, *supra,* that the suspension statute does not extend the statute of limitations in respect of false and fraudulent statements in violation of Section 35(A) except in cases where the fraud results in a financial or property loss to the Government. If a mere false statement in a matter within the jurisdiction of an agency of the United States, as in the *Gottfried* case, is covered by the suspension statute, it would appear to follow *a fortiori* that the false statements involved here should also be so treated. Certainly the fraud involved in procuring or attempting to procure naturalization by false representations is as serious a matter as a false statement to the O.P.A. in procuring rations. Although the court below in this case distinguished *Gottfried* on the basis that there it had interpreted Section 35(A) of the Criminal Code as involving fraud as an ingredient of the offense, the wording of the two substantive statutes does not support such distinction. The District Court in the *Bridges* case thought, and we believe rightly, that the rationale of the *Gottfried* decision applies here. In a later case in the District Court for the Northern District of California, *United States* v. *Choy Kum,*

91 F. Supp. 769, involving a prosecution for making false statements in an application for a passport, in violation of 18 U.S.C. (1948) 1542, and for making false statements in violation of the false claims statute, the court also adopted the *Gottfried* view.

"Fraud," in relation to dealings with the United States, has long been given a broad connotation. In *United States* v. *Gilliland,* 312 U. S. 86, the Court construed the false statement provision of Section 35(A) of the Criminal Code as designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" and as reaching false and fraudulent statements not involving pecuniary or property loss to the United States (p. 93).[11]

So too, the word "fraud" as used in the denaturalization statute has been broadly construed. In *Knauer* v. *United States,* 328 U. S. 654, 657, the Court said:

> * * * The first and crucial issue in the case is whether Knauer swore falsely and committed a fraud when he promised under oath to foreswear allegiance to the German Reich and to transfer his allegiance to this nation. Fraud connotes perjury, falsification, concealment, misrepresentation.[12]

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[11] See also *Haas* v. *Henkel,* 216 U.S. 462, 479-480; *Hammerschmidt* v. *United States,* 265 U.S. 182, 188.

[12] See also *United States* v. *Ness,* 245 U.S. 319, 324, 327; *Johannessen* v. *United States,* 225 U.S. 227, 241, 242.

That Congress has always considered the facts on which counts 1 and 2 are based as constituting fraud against the United States is clear (*Knauer* v. *United States, supra,* at p. 672); and as the penal provisions of the Nationality Act are obviously intended to put teeth in the administration of that act, the ingredient of fraud is implicit in this penal section.

Surely, knowingly to make a false statement under oath in a naturalization proceeding is an "offense * * * involving fraud" within the meaning of 18 U.S.C. (1948 rev.) 3287. The District Court in the *Bridges* case gave a generic meaning to the word "fraud" as used in the suspension statute (86 F. Supp. at 927).[13] The legislative history of that statute shows that Congress used the word in that sense, and this usage accords with the judicial interpretation of statutes dealing with fraud against the United States.

There is nothing in the earlier *Noveck, McElvain* and *Scharton* cases to support the view that either the statutes involved there or the present suspension statute were intended to apply only to offenses involving pecuniary or property loss to

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[13] "The government contends that the Wartime Suspension of Limitations Act is equally applicable to all three counts on the general theory that fraud is implicit in each count. * * * This contention is no doubt sound for when we examine the statute in question * * * it is manifest that the language used is broad, sweeping and all-inclusive as to fraud in a generic sense, perpetrated 'in any manner, whether by conspiracy or not.'"

the United States. It is significant that in those cases the Court was concerned with provisos in limitation statutes which allowed longer periods of limitation for specified offenses. The proviso involved in the *Noveck* and *McElvain* cases was added in 1921, after the first World War was over, as an amendment to the general statute of limitations in R.S. 1044. The proviso involved in *Scharton* was contained in a section of the Revenue Act of 1926 fixing three years as the period of limitations upon prosecutions of offenses against the internal revenue laws. Each of the provisos allowed six years for the prosecution of offenses "involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." In both the *McElvain* (272 U. S. at 639) and *Scharton* (285 U. S. at 521) cases, the Court said that a strict construction of the provisos was required because they excepted a special class of cases from the operation of the general limitation provision. The present suspension statute, on the other hand, originated as independent legislation and is therefore not subject to the rule of statutory construction applied in the earlier cases. Rather, it should be construed so as to give effect to its plain purpose. It was originally enacted in 1942, in the early days of the war. And the legislative history shows that it was designed to prevent the running of limitations against offenses at a time when the

law-enforcement branch of the Government was occupied with duties in connection with the war effort.[14]

It is important, in considering what Congress intended in the present suspension act, to recall that Congress did not stop to express disagreement with the narrow construction which this Court gave the 1921 proviso. As this Court noted in *Braverman* v. *United States,* 317 U. S. 49, 54, 55, Congress wrote specific provisions into the Revenue Act of 1932 for the express purpose of overcoming those decisions. It is unreasonable to believe that in 1942 Congress wrote into legislation a

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[14] H. Rep. No. 2051 and S. Rep. No. 1544, 77th Cong., 2d sess., wherein both committees stated:

"During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

"Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of present-day events, for the protection of those who would defraud or attempt to defraud the United States."

construction which was so narrow that earlier legislation had already been enacted to overcome it.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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IN THE

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OCTOBER TERM, 1950

No. 557

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL OBERMEIER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI

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I

The opinion below of the Court of Appeals has now been reported at 186 F. (2d) 243.

II

As we have pointed out in our petition for certiorari in case No. 505 (at pp. 8-9), the opinion of the Court of Appeals suggests that that Court was not entirely free from doubt in its affirmance of Obermeier's conviction upon count three of the indictment. It indicated no such doubt, however, in its reversal of his conviction upon counts one and two, from which reversal the Government is seeking cer-

tiorari herein. We believe that the reasons given by the Court of Appeals for holding that Obermeier's prosecution upon counts one and two was barred by limitations and for reversing his conviction upon those counts effectively dispose of that branch of the case and conclusively answer every argument advanced by the Government in support of its petition herein.

The only doubtful question, as the Court of Appeals made clear, is whether Obermeier's conviction upon count three should be sustained; and that is the question presented by Obermeier's petition for certiorari in case No. 505.

III

It is respectfully submitted that the Government's petition for certiorari herein should be denied.

Respectfully submitted,

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